



Australian Government

Tax Deductible Gift Recipient Reform Opportunities

Discussion Paper
15 June 2017

NOTES TO PARTICIPANTS

This paper is for consultation purposes only. Comments are due by 14 July 2017.

CONTENTS

Consultation Process	iii
Request for feedback and comments.....	iii
Tax Deductible Gift Recipient Reform Opportunities	1
Introduction/Background	1
Issues	2
Summary of proposed reforms.....	4
Strengthening Governance Arrangements	5
Reducing complexity	9
Integrity.....	12
Parliamentary Inquiry into the Register of Environmental Organisations	14
Summary of consultation questions	19

CONSULTATION PROCESS

Request for feedback and comments

This consultation paper considers potential reforms to the Deductible Gift Recipient (DGR) tax arrangements.

DGR status allows an organisation to receive gifts and contributions for which donors are able to claim a tax deduction. The DGR tax arrangements are intended to encourage philanthropy and provide support for the not-for-profit (NFP) sector. Along with other tax concessions to the NFP sector, DGR status encourages the delivery of goods and services that are of public benefit. The DGR provisions can be found in Division 30 of the *Income Tax Assessment Act 1997* (Cth) (Gifts and Contributions).

This paper outlines a number of proposals to strengthen the DGR governance arrangements, reduce administrative complexity and ensure that an organisation's eligibility for DGR status is up to date.

Interested parties are invited to comment on the proposals outlined in this paper.

Electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

If you would like part of your submission to remain in confidence, you should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Closing date for submissions: 14 July 2017

Email: DGR@treasury.gov.au

Mail: Senior Adviser
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Enquiries: Enquiries can be initially directed to Susan Bultitude.

Phone: 02 6263 4413

TAX DEDUCTIBLE GIFT RECIPIENT REFORM OPPORTUNITIES

INTRODUCTION/BACKGROUND

1. The purpose of this paper is to consider possible reforms to the Deductible Gift Recipient (DGR) tax arrangements. In particular, it will examine the governance of DGRs and the complexity of DGR application processes, as well as to consider ways to ensure an organisation's eligibility for DGR status is up to date.
2. The Australian not-for-profit (NFP) sector is large and diverse. It consists of approximately 600,000 organisations across a number of different entity types. As of 17 February 2017, around 54,800 charities were registered with the ACNC.¹ There are around 28,000 organisations endorsed as DGRs², of which around 18 per cent are not registered charities – under 10 per cent are government entities (and therefore not eligible for charity registration) and over 8 per cent could seek charity registration with the ACNC.
3. DGR status allows an organisation to receive tax-deductible gifts and contributions. Donors are able to claim a tax deduction for gifts and contributions. The DGR tax arrangements are intended to encourage philanthropy and provide support for the NFP sector. Along with other tax concessions available to the NFP sector, DGR status encourages donations to organisations and encourages the delivery of goods and services that are of public benefit. The DGR provisions can be found in Division 30 of the *Income Tax Assessment Act 1997* (Gifts and Contributions).
4. In recent times, two reviews have examined aspects of the DGR tax arrangements and made recommendations. Some recommendations remain under consideration. The reviews are:
 - the House of Representatives Standing Committee on the Environment's inquiry on the Register of Environmental Organisations (REO inquiry³) – April 2016; and
 - the report of the NFP Sector Tax Concession Working Group⁴ - May 2013.
5. Under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act), registered charities (except basic religious charities) must meet a set of governance standards to be registered and remain registered with the ACNC (the national regulator of charities established in December 2012)⁵. Compliance with the standards and the ACNC Act help charities to retain the public's trust and confidence.
6. The *Charities Act 2013* (Cth) (Charities Act) introduces statutory definitions of 'charity' and 'charitable purpose'. To be a charity, the organisation must have a charitable

¹ According to the ACNC, 38.4% of registered charities have DGR status (Australian Charities Report 2015).

² Australian Taxation Office, *Taxation Statistics 2013-14* (2016).

³ See <http://www.aph.gov.au/reo>

⁴ See

<http://www.treasury.gov.au/~media/Treasury/Access%20to%20Information/Disclosure%20Log/2014/1447/Downloads/PDF/NFP%20Sector%20WG%20Final%20Report.ashx>

⁵ The governance standards do not apply to a limited class of charities called 'basic religious charities'.

purpose or charitable purposes that are for the public benefit⁶. The Charities Act lists 12 charitable purposes which apply for the purposes of all Commonwealth legislation. The ACNC provides information, guidance and support for registered charities in meeting their obligations under the ACNC legislation, as well as monitoring and managing non-compliance.

7. To be eligible to be registered as a charity with the ACNC, the organisation must also:
 - be an NFP entity;
 - have an ABN;
 - comply with ACNC governance standards⁷;
 - not have a 'disqualifying purpose' (which means the purpose of engaging in or promoting activities that are unlawful or contrary to public policy, or the purpose of promoting or opposing a political party or a candidate for political office); and
 - not be an individual, political party or government entity.
8. The changes under consideration in this paper do not seek to change the existing eligibility criteria, as this is beyond the scope of this paper. Scrutiny of an organisation's continued eligibility is appropriate as the scope of activities undertaken by an organisation can change over time, potentially making them ineligible for DGR status. This discussion paper seeks feedback on how to manage compliance burdens associated with the process of more effectively assessing and monitoring ongoing DGR eligibility.

ISSUES

9. DGR concessions were first provided in 1915. The DGR system has evolved over the years and it is timely and appropriate to consider whether the system is as simple and transparent as it could be, so that DGRs can easily understand and meet their obligations. There are now 51 general categories (which includes the four registers).
10. There are concerns that the application process for obtaining DGR status is too complex. There are different processes for organisations that are already registered as charities and those that are not. Organisations that are seeking registration as charities can apply to the ACNC, and indicate on the ACNC's charity registration form that they want the ATO to assess their eligibility for one of 47 general DGR categories. Organisations that are not registered as charities can apply directly to the ATO for DGR endorsement.

Organisations can apply for entry to one of four DGR registers – there are over 2,500 organisations on these registers. These registers are administered by four different Government departments:

⁶'Charity' is defined in section 5 of the Charities Act 2013 (Cth) (Charities Act) and 'charitable purpose' is defined in section 12 of the Charities Act.

⁷Except for basic religious charities.

- The Department of Foreign Affairs and Trade administers the Overseas Aid Gift Deduction Scheme and register⁸.
 - The Department of Social Services administers the Register of Harm Prevention Charities⁹.
 - The Department of the Environment and Energy administers the Register of Environmental Organisations¹⁰.
 - The Department of Communications and the Arts administers the Register of Cultural Organisations¹¹.
11. The categories and registers have evolved over time, broadly seeking to align the activities of DGRs with community expectations and to ensure the tax concessions deliver clear public benefits. When first developed, it was considered that the registers required subject specific assessment of eligibility by their respective departments. But in practice, the four registers adopt a more involved process for DGR applicants and obtaining DGR status under the register arrangements can take over a year for some applications.
 12. Organisations that do not fall within one of the 47 general categories or four registers may apply to be considered for specific listing with the Minister for Revenue and Financial Services. There are currently only around 190 specifically listed organisations as they have been granted DGR status in 'exceptional circumstances'. DGR organisations with a specific listing may not be subject to a sunset clause or registered with the ACNC and are effectively granted DGR status in perpetuity, without being subject to governance standards or the other requirements of the ACNC legislation.
 13. The majority of DGRs are endorsed without a sun-setting date, and they are not subject to regular review of their eligibility status. With the growing stock of DGR organisations, the system would benefit from regular reviews to ensure an organisation's DGR status is up to date.
 14. Certain types of DGRs are also required to establish a public fund to receive tax deductible gifts and contributions. Public funds added additional governance requirements to address risk particular to certain categories. The establishment of a public fund requires the nomination of a 'responsible person' as defined by the ATO¹² and there is some confusion with the ACNC's different definition for 'responsible person'¹³. DGR organisations in regional and rural parts of Australia often face

⁸ <http://dfat.gov.au/aid/who-we-work-with/ngos/Pages/tax-deductibility.aspx>

⁹ <https://www.dss.gov.au/our-responsibilities/communities-and-vulnerable-people/programmes-services/register-of-harm-prevention-charities#1>

¹⁰ <https://www.environment.gov.au/about-us/business/tax/register-environmental-organisations>

¹¹ <https://www.arts.gov.au/what-we-do/cultural-heritage/register-cultural-organisations>

¹² According to ATO website - 'Responsible Person - The rules must reflect that the majority of individuals, who are one of the following, must have a degree of responsibility to the community: a trustee; a member of any committee or other controlling body of the fund; or a director of a trustee'.

See https://www.ato.gov.au/Non-profit/Getting-started/In-detail/Types-of-DGRs/Public-ancillary-funds/?anchor=Public_ancillary_funds#Public_ancillary_funds

¹³ The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act) defines the concept of a 'responsible entity'. The responsible entities of a registered charity are the people in the organisation that have one of the positions described in s.205-30 of the ACNC Act. The ACNC refers to the 'responsible entities' of charities as 'responsible persons'.

difficulties in nominating a responsible person. This creates an additional procedural barrier for these types of DGRs, without necessarily improving governance. The public fund requirements may therefore be unnecessary for DGRs that are charities and subject to ACNC governance standards.

15. There are also concerns that some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community, particularly by environmental DGRs which must have a principal purpose of protecting the environment.¹⁴
16. Broadly, the various requirements for DGR eligibility are directed at ensuring the activities of DGRs deliver benefits to the Australian community. However, requirements may be overlapping and inconsistently applied across organisations. Transparency and accountability regarding the eligibility of DGRs, which can change the scope of their activities over time, is also lacking.

Summary of proposed reforms

17. To strengthen the governance arrangements, reduce administrative complexity and to help ensure an organisation's DGR status is up to date, this paper considers a number of possible reforms:
 - All DGRs could be required to be charities registered and regulated by the ACNC (other than government entities, which cannot be charities).
 - The ACNC's guidance for registered charities (and subsequently for DGRs) help these organisations to understand their obligations, particularly for certain types of advocacy. The ACNC has already developed guidance on advocacy so DGRs that are not currently registered charities should refer to this resource.
 - The ACNC could revoke an organisation's registration status, and consequently the ATO would revoke the organisation's DGR status, if one of the grounds for revocation under the ACNC Act were to exist.
 - To simplify the application process for DGRs, the administration of the four DGR registers could be transferred to the ATO. Those organisations that do not fall within the four registers would still be able to apply to the Minister Revenue and Financial Services for specific listing.
 - The public fund requirement for DGRs that are charities could be removed and DGR entities could apply to be endorsed across multiple categories.
 - Regular reviews could be undertaken by the ACNC and/or ATO to ensure an organisation's DGR status was up to date and to provide confidence to donors wishing to claim tax deductions for donations. In addition, DGRs could be required to certify annually that they meet the DGR eligibility requirements, with penalties for false statements.

¹⁴ Subsection 30-265(1) of the *Income Tax Assessment Act 1997* - Its principal purpose must be: (a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or (b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment.

- The reforms outlined above would address many of the issues identified by the House of Representatives Standing Committee's REO inquiry¹⁵. Further discussion of the REO inquiry recommendations are detailed below under the heading – *Parliamentary Inquiry into the Register of Environmental Organisations*.

Strengthening Governance Arrangements

Issue 1: Transparency in DGR dealings and adherence to governance standards.

18. Around eight per cent of the current stock of 28,000 DGRs are not registered charities or government entities. These organisations are not necessarily subject to robust reporting and governance standards¹⁶.
19. The four DGR registers, which are not administered by the ATO, have separate reporting requirements. Not all organisations on the environmental and cultural registers are charities, so organisations on the same register can have different reporting requirements and governance standards. This also means that there are organisations which report both to the register and the ACNC.
20. The Government provides a substantial financial contribution to NFP entities through tax concessions. The cost to the Commonwealth of deductions from donations to DGR organisations is \$1.31 billion in 2016-17 rising to an estimated \$1.46 billion in 2019-20. Once an entity is a DGR, it is generally for life, and is subject to minimal governance unless it is an ACNC regulated charity. Given the generous tax concessions they receive, it is appropriate to require DGRs to be transparent in their dealings and to adhere to appropriate governance standards.

Proposed Action

21. To address transparency issues and improve DGR governance, DGRs (other than government entities) could be required to become charities registered and regulated by the ACNC. This would be consistent with recommendation 2 from the House of Representatives Standing Committee on the Environment's REO inquiry. The Committee recommended requiring environmental organisations to be registered with the ACNC as a prerequisite to obtaining endorsement as a DGR by the ATO.
22. The proposal is also consistent with recommendation 6.5 of the NFP Sector Tax Concession Working Group Report of May 2013¹⁷, which expected that the majority of current specifically listed or endorsed entities would fit within the proposed framework.
23. For specific listing as a DGR in the tax law, a Treasury Minister would have the discretion to propose to Cabinet an organisation that is not a charity.
24. For existing DGR organisations, the requirement could commence 12 months after passage of the amending legislation or from Government announcement to give organisations and the ACNC sufficient time to register the new charities.

¹⁵ See <http://www.aph.gov.au/reo>

¹⁶ They are comprised primarily of some registered environmental and cultural organisations, some ancillary funds, public funds for persons in necessitous circumstances, some public ambulance committees, volunteer based emergency service public funds, some museums, and some school building funds.

¹⁷ <http://www.treasury.gov.au/~media/Treasury/Access%20to%20Information/Disclosure%20Log/2014/1447/Downloads/PDF/NFP%20Sector%20WG%20Final%20Report.ashx>

25. The ACNC's registration team would work with existing DGR organisations to help them apply for charity registration status. They would engage with applicants to ensure that only organisations that are genuine charities are registered.
26. ACNC registration would mean that DGRs would be required to lodge an Annual Information Statement, and in the case of medium and large charities¹⁸, also lodge annual financial reports with the ACNC, which are publicly accessible through the ACNC Charity Register (ACNC Register). Registration as a charity would enhance transparency in the use of taxpayer funds.
27. The ACNC Register includes core information on all registered charities, including name, contact details, governing documents, names and positions of people on their governing bodies, and financial reports (for medium and large charities). The ACNC can withhold or remove information from the ACNC Register in prescribed circumstances. Private ancillary funds can ask the ACNC to withhold or remove some information from the ACNC Register, such as information likely to identify individual donors.
28. DGRs, once registered as charities, would also have to adhere to the ACNC governance standards. If any DGR entities were not adhering to the standards, they could face revocation of their registration status, which would mean that their DGR status could be revoked by the ATO and also impact other tax concessions.

¹⁸ The charity's size is based on its revenue for the reporting period. Medium registered charities are those whose annual revenue is \$250,000 or more but less than \$1 million. Large registered charities are those with annual revenue of \$1 million or more (section 205-25 of the ACNC Act).

Consultation questions

1. What are stakeholders' views on a requirement for a DGR (other than government entity DGR) to be a registered charity in order for it to be eligible for DGR status. What issues could arise?

As a general point, please note that Cancer Council is a federation of nine separate charities with significant scope and history, and one that would be collectively regarded as a large health charity with a shared mission and purpose. Our comments should be seen in this context and may not apply to the whole sector.

Our understanding is that the ACNC was established to regulate the charity sector, minimise administrative burden and help to inform consumer/donor choice. From our perspective as a charitable DGR, there is therefore a logical case for requiring DGRs which claim to do charitable works to register with the ACNC.

This proposed change seems a good move to simplify and streamline the Charity/DGR registration process from both sides.

Although it would be good to know which (if any) organisations currently have DGR status, however would not be eligible under the ACNC Charity registration process.

2. Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why?

Our view is this would be best determined by an audit of current DGRs who are not registered as charities, and determining their eligibility for charity status under criteria already enshrined in the Charities Act.

3. Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly?

None that we are aware of.

Issue 2: Ensuring that DGRs understand their obligations, for example in respect of advocacy.

29. There are concerns that charities and DGRs are unsure of the extent of advocacy they can undertake without risking their DGR status. This is a particular concern for environmental DGRs, which must have a principal purpose of protecting the environment.¹⁹
30. With the ACNC's establishment, charities were given time to transition to a new system. Noting the ACNC's ongoing role has been confirmed and given the proposal to require all DGRs to become registered charities, the ACNC would work with the new registered charities to assist them to understand their obligations.

Proposed Action

31. The ACNC would clearly set out the rules applying to registered charities for the DGRs that become new registered charities, helping to ensure that they understand their obligations, particularly for certain types of advocacy. As with all registered charities, if an organisation does not meet its obligations, the ACNC would be able to take steps to facilitate compliance and where appropriate enforce proportionate sanctions which could include the revocation of registration status leading to the loss of their DGR status.
32. The ACNC give smaller charities²⁰ additional support to help them comply with their reporting and other obligations. It should be noted that the majority of registered charities are small, and do meet their obligations. A set of template governing documents and model rules for unincorporated associations has been developed with associated guidance and explanatory notes to assist smaller charities meet certain legal requirements.

Consultation questions

4. Should the ACNC require additional information from all registered charities about their advocacy activities?

Our understanding of the Charities Act and ACNC criteria in respect of advocacy is that there are only two advocacy "purposes" which warrant disqualification from registered charity status:

- 1) Unlawful behaviour; and/or
- 2) Promoting or opposing a political party or candidate for political office.

We support both provisions in general. The first is clear and in our view important and essential. The second is less clear: "Promoting or opposing a political party or candidate...". In our view the guidelines could be clarified to ensure that DGRs with a charitable purpose are able to make public comments about the policies of parties and candidates that relate to

¹⁹ Subsection 30-265(1) of the Income Tax Assessment Act 1997 - Its principal purpose must be: (a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or (b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment.

²⁰ Small registered charities are those with annual revenue of less than \$250,000 (section 205-25 of the ACNC Act).

mission, without risk of losing DGR status and other concessions, provided such comments are not overtly political. (We note that clearer guidelines are out of scope of this consultation.)

In direct answer to question 4, there would in our view be limited benefit and some practical difficulties in requiring charitable DGRs to provide additional information about their advocacy activities, particularly in the absence of clearer guidance as stated.

Cancer Council is not a political organisation and nor are the vast majority of non-government DGRs. Apart from a standard disclaimer asserting that a DGR does not engage in overt political activity, it could be administratively burdensome for NGOs to report on all activities in support of mission which are legitimate contributions to public discourse and policy debate.

It would in our view be more efficient if the ACNC maintained a watching brief and challenged the tiny minority of charitable DGRs that might engage in overt political activity, rather than seeking a token assurance from the vast majority that they are fundamentally nonpartisan and apolitical, or requiring another layer of (in our view unnecessary) reporting.

5. Is the Annual Information Statement the appropriate vehicle for collecting this information?

Agree that collecting all required information in the Annual Information Statement is consistent with the ACNC's 'report once use often' charity reporting model.

However, as per Qn 4, in our view it would be more efficient if the ACNC maintained a watching brief and challenged the tiny minority of charitable DGRs that might engage in overt political activity, rather than seeking a token assurance from the vast majority that they are fundamentally nonpartisan and apolitical, or requiring another layer of (in our view unnecessary) reporting.

6. What is the best way to collect the information without imposing significant additional reporting burden?

Ideally all required compliance information should be requested and supplied via the Annual Information Statement.

Reducing complexity

Issue 3: Complexity for approvals under the four DGR registers.

33. Organisations in certain fields can qualify for DGR status by being included on one of the four DGR registers - the Register of Environmental Organisations (REO), the Register of Cultural Organisations (ROCO), the Register for Harm Prevention Charities (RHPC) and the Overseas Aid Gift Deduction Scheme (OAGDS).
34. The separate portfolio registers were established to draw on the subject-matter expertise within each agency when assessing applications against the requirements of the *Income Tax Assessment Act 1997*.
35. It can take over a year for an organisation to be included on a DGR register. An organisation that applies for DGR status under one of the DGR registers must firstly

apply to the government agency which administers that register. Once the application has been assessed to meet the requirements of the particular register, the portfolio Minister must approve the addition and also seek a Treasury Minister's agreement. For the OAGDS register, the Treasury Minister must also gazette the organisation's public fund. Once an application has been through the Ministerial processes, the ATO can then officially endorse them as a DGR.

36. These arrangements are time consuming and add little value to supporting a robust process for assessing an applicant's eligibility for DGR status. Furthermore, all the DGR registers have different annual reporting requirements, adding unnecessary complexity. If all DGRs are required to be a registered charity, reporting could be simplified. The time taken to apply for DGR status could also be significantly reduced.
37. These issues were highlighted as recommendations in the recent REO inquiry and the 2011 Mitchell report on Private Sector Support for the Arts.²¹

Proposed Action

38. It is proposed to transfer the administration of the four DGR Registers to the ATO. This proposal is consistent with recommendation 1 of the REO inquiry by the House of Representatives Standing Committee on the Environment. The Committee recommended that REO be abolished and that the administration process for endorsement as a DGR for environmental organisations be transferred wholly to the ATO.
39. Transferring the administration of the four DGR Registers to the ATO is expected to reduce the compliance burden for the NFP sector, reduce government administration and reduce the application processing time, as Ministers would no longer be required to agree to DGR applications.
40. An organisation must already be a registered charity with the ACNC to be added to the RHPC and OAGDS registers. If all DGRs (other than government entities) were charities, there would be one process for all non-government entities to apply for DGR status under all general DGR categories. It would also mean that all organisations on the four DGR registers would need to complete an Annual Information Statement and where required, lodge annual financial reports for public scrutiny. This would also mean that DGRs, as registered charities, would need to adhere to the same ACNC reporting and governance standards.
41. If there were additional questions that were needed on the Annual Information Statement, the ACNC would consult on their content with stakeholders, the ATO, Treasury and the relevant government agency.
42. Under this proposal all new applicants would need to apply once to the ACNC for registration status and nominate to be considered for endorsement under one of the general DGR categories, which includes the four DGR registers. Once registration status is approved, the ACNC would pass the information to the ATO to assess an organisation's eligibility against the requirements of the tax law in respect of that general DGR category. It is expected that this process could be completed within a month of the correct information being supplied in the application. A Treasury Minister would continue to have oversight of administration.

²¹<https://www.arts.gov.au/publications/building-support-report-review-private-sector-support-arts-australia>.

43. When the four DGR Registers were established, it was considered that each agency should administer their specific register as they would have the expertise to assess applications against the requirements of the *Income Tax Assessment Act 1997*²². Under the proposed transfer, the ATO would assess applications against the requirements of the tax law. The ATO would be able to call on the expertise in the relevant government agency on a case by case basis, if required.
44. The ATO would work with the relevant Government agencies to affect a smooth transfer of the administration functions from the agencies to the ATO.

Consultation question

7. What are stakeholders' views on the proposal to transfer the administration of the four DGR Registers to the ATO? Are there any specific issues that need consideration?

This is not a matter of concern for Cancer Council's, however we agree that creating one channel for all DGR applications, is an appropriate move to simplify and streamline the Charity/DGR registration process.

We are not familiar with the four DGR registers as they are not applicable to Cancer Councils work.

Issue 4: Complexity and red tape created by the public fund requirements

45. Various DGR general categories require entities to establish a public fund to receive tax deductible donations. Public funds need to reflect the purpose of the fund, be managed by a committee which has a degree of responsibility to the general community and the funds kept separate from other funds of the entity. With the introduction of ACNC governance standards, the development of more sophisticated accounting systems and electronic banking, the requirement for a charitable DGR entity to maintain a public fund is potentially unnecessary.
46. Under the existing law, a separate public fund is required for each general category if an organisation wishes to seek DGR status in more than one general category. Some organisations apply for DGR specific listing to avoid applying for multiple categories. The creation of separate funds can increase the complexity of financial statements and add to the regulatory burden when applying for more than one general DGR category.
47. There is also confusion and added complexity for DGRs because of the difference in the definition of 'responsible person' used by the ATO for DGRs and the ACNC for charities.
48. Under the ACNC Act, the term 'responsible entity' refers to those who have one of the positions described in the Act.²³ The ACNC refers to 'responsible entities' of charities as 'responsible persons'. Generally, a charity's responsible people are its board or committee members, or trustees (including insolvency trustees or administrators)²⁴.

²² For example, for environmental organisations see section 30-290 of the ITAA 1997
http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s30.250.html

²³ ACNC Act, s.205-30.

²⁴ See https://www.acnc.gov.au/ACNC/FTS/FS_RespPers.aspx

49. In addition, DGR entities in regional and rural Australia have problems in identifying committee members for public funds because of the tighter definition of 'responsible person' in the tax area.
50. The removal of the public fund requirement would lead to the definition of responsible person having less significance to the ATO in relation to DGR entities and remove the confusion over the two different definitions in the tax and ACNC legislation.

Proposed Action

51. It is proposed to remove the public fund requirements for charities and allow DGR entities to be endorsed in multiple categories.
52. As a result, the ACNC definition of 'responsible person' would apply as the DGR must be a registered charity.

Consultation question

8. What are stakeholders' views on the proposal to remove the public fund requirements for charities and allow organisations to be endorsed in multiple DGR categories? Are regulatory compliance savings likely to arise for charities who are also DGRs?

Removing the public fund requirements seems a good move to reduce duplication in the administration of certain DGR's.

Although we note that the financial reports and records of charities classified as 'small' under the ACNC Act are not required to be reviewed or audited. As a result, removing the public fund requirements could potentially increase the risk of fraudulent activity within a 'small' DGR that currently requires additional governance of a 'public fund'.

We note that this risk would be no more than that of any 'small' DGR that does not require a review or audit.

And that a robust audit program by the

- ACNC to review compliance to the Governance Standards, and
- ATO to review compliance with DGR requirements,

With a focus on higher risk small DGRs would help manage the risk of fraudulent activity, and build confidence in the charitable sector.

Integrity

Issue 5: DGRs endorsed in perpetuity, without regular and systemic review

53. The Government provides a substantial financial contribution to NFP entities through tax concessions, but once an entity is a DGR, it is generally for life. Currently, a DGR is subject to minimal governance unless it is an ACNC regulated charity. It is important to have appropriate measures in place to ensure an organisation's DGR status is up to date, to reassure donors, given the generous tax concessions available.

54. The majority of DGR entities have been endorsed in perpetuity. Unless the ATO undertakes a review or audit of a specific DGR organisation, it is difficult for the ATO to identify if the organisation remains eligible to retain its DGR status.
55. While the ATO encourages DGR entities to self-review annually, or when their circumstances change, in practice the ATO does not know if an entity is undertaking this review. An entity may have evolved over many years into a different organisation that no longer meets the criteria for their general DGR category, or for any category.

Proposed Action - rolling reviews to address existing DGR stock

56. Consideration could be given to a rolling review by the ACNC and/or ATO to ensure that each DGR organisation is still eligible for DGR status. Each DGR could be reviewed at least once within a specified period, for example five years. To determine which general categories could be reviewed in the first instance, a risk assessment could be developed based on the likelihood of changes in purpose over time.
57. These reviews could commence with a desk top review by the ACNC and the ATO. Those organisations identified as high risk from the desk top review would be investigated further. Organisations confirmed as no longer eligible for DGR status would have their status revoked, and may also lose some of their other tax concessions if their charity registration status is also revoked.
58. The reviews would be undertaken in a way to minimise the burden on DGR organisations, with the ACNC or ATO only seeking information from organisations after conducting a desk top review and assessing them as high risk or seeking missing information.

Proposed Action - Annual certification by DGR

59. As part of completing their Annual Information Statement as a registered charity, DGRs could also be required to certify that they meet the DGR eligibility requirements. Penalties, under the tax legislation, could apply if an organisation certified it met the eligibility criteria and, through the review or otherwise, it was subsequently found not to be eligible for DGR endorsement.

Consultation question

9. What are stakeholders' views on the introduction of a formal rolling review program and the proposals to require DGRs to make annual certifications? Are there other approaches that could be considered?

Agree that an annual certification requirement and a rolling review program would help to ensure a more current register of DGR's, protect community interests, and build confidence in the Charitable sector.

10. What are stakeholders' views on who should be reviewed in the first instance? What should be considered when determining this?

Our view is the greatest risk lies with Small charities that are not required under the ACNC Act to lodge an externally reviewed or audited report.

Issue 6: Specific listing of DGRs by Government

60. A specifically listed DGR entity has DGR status in perpetuity, unless there is a special condition that restricts its listing period. As DGR entities can evolve over time, there may come a time when the 'exceptional circumstances' that justified their specific listing no longer applies.

Proposed Action

61. A sunset period of no more than five years could be introduced as a general rule for all specifically listed DGRs. After five years, the organisation would need to reapply for endorsement. This would give the Government of the day and Parliament the opportunity to decide whether the organisation still met the 'exceptional circumstances' requirement.

Consultation question

11. What are stakeholders' views on the idea of having a general sunset rule of no more than five years for specifically listed DGRs? What about existing listings, should they be reviewed at least once every, say, five years to ensure they continue to meet the 'exceptional circumstances' policy requirement for listing?

Agree – a sunset period of no more than five years seems appropriate.

No DGR entity should have DGR status in perpetuity.

Parliamentary Inquiry into the Register of Environmental Organisations

62. On 4 May 2016, the House of Representatives Standing Committee on the Environment tabled its report of its inquiry into the Register of Environmental Organisations (REO)²⁵. Consistent with the terms of reference for the inquiry, the Committee considered the administration and transparency of the REO, which enables eligible environmental organisations to become a DGR in order to obtain tax-deductible donations from taxpayers.
63. The focus of the inquiry was on the effectiveness of the REO in supporting communities to undertake practical action to improve the environment. The Committee made recommendations designed to strengthen the integrity of tax-concessional arrangements for environmental organisations. The Committee also identified scope to streamline the administration of the REO system.
64. The Committee made nine recommendations many of which can be applied to the DGR system as a whole and to the other DGR registers - the Register of Cultural

²⁵ <http://www.aph.gov.au/reo>

Organisations, the Register for Harm Prevention Charities, and the Overseas Aid Gift Deduction Scheme.

Recommendation 1

65. **The Committee recommended that the Register of Environmental Organisations be abolished and that the administration process for endorsement as a DGR for environmental organisations be transferred wholly to the ATO.**
66. The action proposed in paragraph 38 would give substantive effect to this recommendation.

Recommendation 2

67. **The Committee recommended that registration as an environmental charity through the ACNC be a prerequisite for environmental organisations to obtain endorsement as a DGR by the ATO.**
68. The action proposed in paragraph 21 would give effect to this recommendation.

Recommendation 3

69. **The Committee recommended that the Treasurer and the Minister for the Environment pursue amendments to the *Income Tax Assessment Act 1997 (Cth)* to remove environmental DGRs listed individually by name in the Act.**
70. The discussion in paragraph 61 proposed that new specific listings continue to be considered by Government and put to the Parliament in the usual way. For specific listing, organisations would need to meet the 'exceptional circumstances' policy requirement and not be eligible to be listed in one of the general DGR categories. There are several environmental organisations that were specifically listed prior to the commencement of the REO that could be eligible for the REO, which would reduce the number of specifically listed DGR entities in the environment section of the tax law.

Recommendation 4

71. **The Committee recommended that the ATO maintain a publicly available list of organisations that receive DGR endorsement as an environmental charity.**
72. As noted in paragraph 26, the proposal to require DGRs to become charities registered and regulated by the ACNC would give some effect to this recommendation. When charities are registered with the ACNC, they appear on the ACNC Register. This is publicly available on the internet and is maintained by the ACNC.

Recommendation 5

73. **The Committee recommended that legislative and administrative changes be pursued by the ATO to require that the value of each environmental DGR's annual expenditure on environmental remediation work be no less than 25 per cent of the organisation's annual expenditure from its public fund.**

74. In making this recommendation, the Committee acknowledged the benefits of a diverse range of environmental work and said it wished to ensure that the concessions conferred on environmental DGRs were directed, at least in some part, to environmental work that achieves clear on-ground environmental outcomes. On the other hand, several stakeholders raised concerns with Committee that it could be difficult for charities to determine whether a particular activity would be considered charitable or political and that resources may be diverted away from charitable work to reporting and compliance activities.

Consultation question

12. Stakeholders' views are sought on requiring environmental organisations to commit no less than 25 per cent of their annual expenditure from their public fund to environmental remediation, and whether a higher limit, such as 50 per cent, should be considered? In particular, what are the potential benefits and the potential regulatory burden? How could the proposal be implemented to minimise the regulatory burden?

This is not our area of work.

However we note that determining whether a particular activity would be considered charitable or political can be complex and nuanced. And that arbitrary figures such as 25% or 50% might be too crude for this purpose.

Our view is that where the purpose of an organisation meets the definition of a charity and it qualifies for DRG status, then it should retain that status until its purpose changes.

Annual certification and periodic audit to ensure eligibility should be applied.

Surveillance techniques as used by the ATO, ASIC and APRA could be applied by the ACNC to validate the certification and to identify targets for review.

Recommendation 6

75. **The Committee recommended that administrative sanctions be introduced for environmental DGRs that encourage, support, promote, or endorse illegal or unlawful activity undertaken by employees, members, or volunteers of the organisation or by others without formal connections to the organisation.**
76. The Committee considered that requiring DGRs to be registered charities would provide greater assurance to members of the public that environmental DGRs are operating lawfully and in the public interest. Under the committee's recommendation, the decision to apply sanctions would be the responsibility of the Commissioner of Taxation.
77. The proposal in paragraph 21, (which is consistent with recommendation 2 of the REO inquiry report) would require all DGRs to be charities registered and regulated by the ACNC. Under the proposal, environmental and other DGRs must not have a disqualifying purpose, which includes the purpose of engaging in or promoting activities that are unlawful or contrary to public policy, or the purpose of promoting or opposing a political party or a candidate for political office.

Consultation question

13. Stakeholders' views are sought on the need for sanctions. Would the proposal to require DGRs to be ACNC registered charities and therefore subject to ACNC's governance standards and supervision ensure that environmental DGRs are operating lawfully?

Agree that requiring DGRs to be registered charities is a good move, to ensure all DGRs are subject to the same ACNC Governance Standards.

Governance standard 3 requires charities to act within Commonwealth, State & Territory laws, and allows the ACNC to investigate potentially serious breaches of law.

However we note that it is not the ACNCs role to investigate breaches of law or issues that other regulators or the police are better placed to handle.

It logically follows that the requirement for all charities to be DGRs will not ensure all DGRs are operating lawfully.

Our view is that there are consequences in place from the ACNC and other regulators for any and all breaches of law - Any individual or organisation engaging in unlawful activity should be required to answer that claim in a court of law and if proven be prosecuted according to the relevant law.

Recommendation 7

78. **The Committee recommended that environmental organisations with DGR status be required to submit an annual self-assessment to the ATO supporting their continuing eligibility for endorsement as a DGR.**
79. The proposal outlined in paragraph 59 above, would give effect to this recommendation.

Recommendation 8

80. **The Committee recommended that the Commonwealth Treasury, in consultation with the ATO, review the provisions in the *Income Tax Assessment Act 1997 (Cth)* prohibiting conduit behaviour, with a view to providing clear guidance to environmental DGRs, as to the types of activities that would constitute conduit behaviour.**
81. Under the *Income Tax Assessment Act 1997* charities wanting access to DGR endorsement need to show that they have a policy of not acting as a mere conduit for the donation of money or property to other organisations, bodies or people.
82. This policy is intended to stop registered organisations acting as collection agencies for tax-deductible donations intended by a donor to be passed on to another organisation or person.
83. ATO ruling (Taxation Ruling 2005/13) relates to this issue. The ATO could work with the DGR sector to clarify further what constitutes prohibited conduit behaviour.

Recommendation 9

84. **The Committee recommended that the ATO, in conjunction with the Commonwealth Treasury, investigate options for establishing annual reporting**

requirements for organisations to maintain deductible gift recipient status as an environmental organisation, where such reporting is to be made publicly available.

85. The proposal outlined in paragraph 26 above would give effect to this recommendation.

Summary of consultation questions

1. What are stakeholders' views on a requirement for a DGR (other than government entity DGR) to be a registered charity in order for it to be eligible for DGR status. What issues could arise?

As a general point, please note that Cancer Council is a federation of nine separate charities with significant scope and history, and one that would be collectively regarded as a large health charity with a shared mission and purpose. Our comments should be seen in this context and may not apply to the whole sector.

Our understanding is that the ACNC was established to regulate the charity sector, minimise administrative burden and help to inform consumer/donor choice. From our perspective as a charitable DGR, there is therefore a logical case for requiring DGRs which claim to do charitable works to register with the ACNC.

This proposed change seems a good move to simplify and streamline the Charity/DGR registration process from both sides. Although it would be good to know which (if any) organisations currently have DGR status, however would not be eligible under the ACNC Charity registration process.

2. Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why?

Our view is this would be best determined by an audit of current DGRs who are not registered as charities, and determining their eligibility for charity status under criteria already enshrined in the Charities Act.

3. Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly?

None that we are aware of.

4. Should the ACNC require additional information from all charities about their advocacy activities?

Our understanding of the Charities Act and ACNC criteria in respect of advocacy is that there are only two advocacy "purposes" which warrant disqualification from registered charity status:

- Unlawful behaviour, and/or
- Promoting or opposing a political party or candidate for political office.

We support both provisions in general. The first is clear and in our view important and essential. The second is less clear: "Promoting or opposing a

political party or candidate...". In our view the guidelines could be clarified to ensure that DGRs with a charitable purpose are able to make public comments about the policies of parties and candidates that relate to mission, without risk of losing DGR status and other concessions, provided such comments are not overtly political. (We note that clearer guidelines are out of scope of this consultation.)

In direct answer to question 4, there would in our view be limited benefit and some practical difficulties in requiring charitable DGRs to provide additional information about their advocacy activities, particularly in the absence of clearer guidance as stated.

Cancer Council is not a political organisation and nor are the vast majority of non-government DGRs. Apart from a standard disclaimer asserting that a DGR does not engage in overt political activity, it could be administratively burdensome for NGOs to report on all activities in support of mission which are legitimate contributions to public discourse and policy debate.

It would in our view be more efficient if the ACNC maintained a watching brief and challenged the tiny minority of charitable DGRs that might engage in overt political activity, rather than seeking a token assurance from the vast majority that they are fundamentally nonpartisan and apolitical, or requiring another layer of (in our view unnecessary) reporting.

5. Is the Annual Information Statement the appropriate vehicle for collecting this information?

Agree that collecting all required information in the Annual Information Statement is consistent with the ACNC's 'report once use often' charity reporting model.

However, as per Qn 4, in our view it would be more efficient if the ACNC maintained a watching brief and challenged the tiny minority of charitable DGRs that might engage in overt political activity, rather than seeking a token assurance from the vast majority that they are fundamentally nonpartisan and apolitical, or requiring another layer of (in our view unnecessary) reporting.

6. What is the best way to collect the information without imposing significant additional reporting burden?

Ideally all required compliance information should be requested and supplied via the Annual Information Statement.

7. What are stakeholders' views on the proposal to transfer the administration of the four DGR Registers to the ATO? Are there any specific issues that need consideration?

This is not a matter of concern for Cancer Council's, however we agree that creating one channel for all DGR applications, is an appropriate move to simplify and streamline the Charity/DGR registration process.

We are not familiar with the four DGR registers as they are not applicable to Cancer Councils work.

8. What are stakeholders' views on the proposal to remove the public fund requirements for charities and allow organisations to be endorsed in multiple DGR categories? Are regulatory compliance savings likely to arise for charities who are also DGRs?

Removing the public fund requirements seems a good move to reduce duplication in the administration of certain DGR's.

Although we note that the financial reports and records of charities classified as 'small' under the ACNC Act are not required to be reviewed or audited. As a result, removing the public fund requirements could potentially increase the risk of fraudulent activity within a 'small' DGR that currently requires additional governance of a 'public fund'.

We note that this risk would be no more than that of any 'small' DGR that does not require a review or audit.

And that a robust audit program by the:

- ACNC to review compliance to the Governance Standards, and
- ATO to review compliance with DGR requirements,

With a focus on higher risk small DGRs would help manage the risk of fraudulent activity, and build confidence in the charitable sector.

9. What are stakeholders' views on the introduction of a formal rolling review program and the proposals to require DGRs to make annual certifications? Are there other approaches that could be considered?

Agree that an annual certification requirement and a rolling review program would help to ensure a more current register of DGR's, protect community interests, and build confidence in the Charitable sector.

10. What are stakeholders' views on who should be reviewed in the first instance? What should be considered when determining this?

Our view is the greatest risk lies with Small charities that are not required under the ACNC Act to lodge an externally reviewed or audited report.

11. What are stakeholders' views on the idea of having a general sunset rule of five years for specifically listed DGRs? What about existing listings, should they be reviewed at least once every five years to ensure they continue to meet the 'exceptional circumstances' policy requirement for listing?

Agree - a sunset period of no more than five years seems appropriate. No DGR entity should have DGR status in perpetuity.

12. Stakeholders' views are sought on requiring environmental organisations to commit no less than 25 per cent of their annual expenditure from their public fund to environmental remediation, and whether a higher limit, such as 50 per cent, should be considered? In particular, what are the potential benefits and the potential regulatory burden? How could the proposal be implemented to minimise the regulatory burden?

This is not our area of work - However we note that determining whether a particular activity would be considered charitable or political can be complex and nuanced. And that arbitrary figures such as 25% or 50% might be too crude for this purpose.

Our view is that where the purpose of an organisation meets the definition of a charity and it qualifies for DRG status, then it should retain that status until its purpose changes.

Annual certification and periodic audit to ensure eligibility should be applied.

Surveillance techniques as used by the ATO, ASIC and APRA could be applied by the ACNC to validate the certification and to identify targets for review.

13. Stakeholders' views are sought on the need for sanctions. Would the proposal to require DGRs to be ACNC registered charities and therefore subject to ACNC's governance standards and supervision ensure that environmental DGRs are operating lawfully?

Agree that requiring DGRs to be registered charities is a good move, to ensure all DGRs are subject to the same ACNC Governance Standards.

Governance standard 3 requires charities to act within Commonwealth, State & Territory laws, and allows the ACNC to investigate potentially serious breaches of law.

However we note that it is not the ACNCs role to investigate breaches of law or issues that other regulators or the police are better placed to handle.

It logically follows that the requirement for all charities to be DGRs will not ensure all DGRs are operating lawfully.

Our view is that there are consequences in place from the ACNC and other regulators for any and all breaches of law - Any individual or organisation

engaging in unlawful activity should be required to answer that claim in a court of law and if proven, be prosecuted according to the relevant law.